



REGULATORY STUDY– LOTS 1 AND 2

ERERA

Best contracting practices

7 May 2013



PROGRAMME



- Opening ceremony – Speech by Mr Thiam, President of ERERA
- General Introduction – Context of the Report
- Presentation and conclusions of sectoral analysis
- Presentation of Legal framework of ERERA - suggestions of amendments
- Guidelines of harmonisation of the exchange contracts
- Model of harmonised contracts
- Recommendations for the reference legal framework for the implementation of energy contracts

GENERAL INTRODUCTION – CONTEXT OF THE REPORT



- The scope: cross-border trade contracts
- Purely national aspects will be discussed in turn
- The actors / Missions
- How are these contracts structured among them?



GENERAL INTRODUCTION – CONTEXT OF THE REPORT



- **The scope: cross-border trade contracts**
- Overall objective of ERERA: to work for the construction of a unified regional energy market
- This market requires:
 - The increase in generation capacity and attainment of the supply/demand balance
 - The expansion and strengthening of transmission and interconnection
 - The establishment of a regulatory framework for cross-border trade, hence for the future regional market
 - The development of open and fair national markets

GENERAL INTRODUCTION – CONTEXT OF THE REPORT



- **Purely national aspects will be discussed in turn**
- The purpose of the review and the workshop is not to discuss purely national markets
- States must maintain their sovereignty and autonomy in energy policy, energy regulation, etc...
- The commitment in the ECOWAS energy policy implies interaction, co-operation between States and between States and ECOWAS
- It is only in this context that some national aspects will be discussed

GENERAL INTRODUCTION – CONTEXT OF THE REPORT



- Setting the stage - which actors / Missions?

GRT

Manages the transmission network and interconnection, and attributes the capacities of either side of the border

Exporter

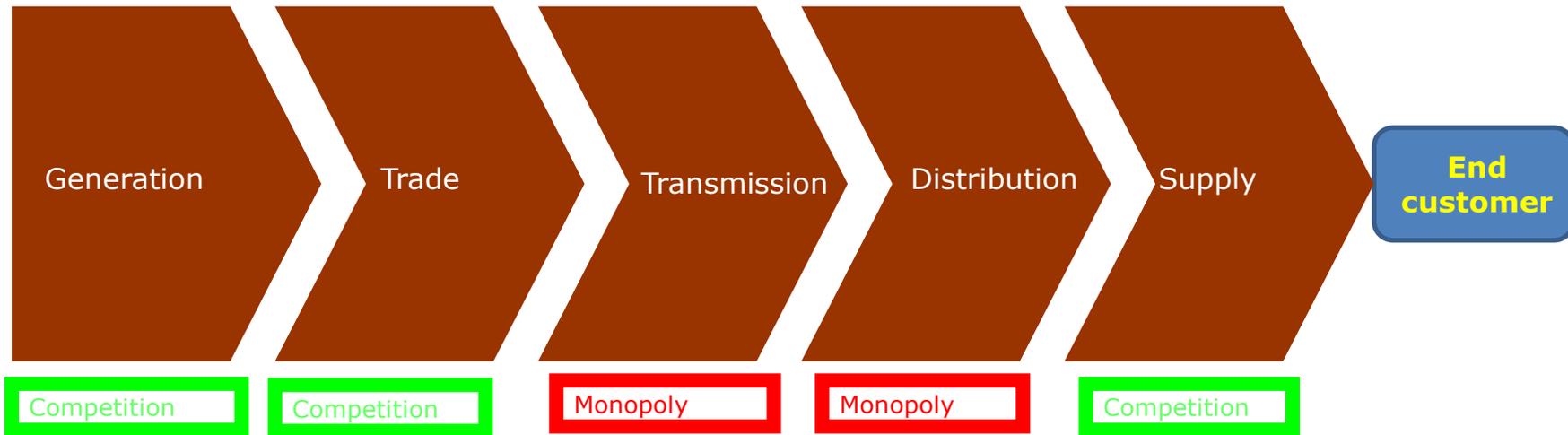
Can be a generator, supplier, broker

Importer

Can be a supplier, final consumer

- Between all these actors: there are contractual relationship that should be defined

GENERAL INTRODUCTION – CONTEXT OF THE REPORT



GENERAL INTRODUCTION – CONTEXT OF THE REPORT



- How are these contracts structured among them?
- These contracts correspond to various configurations
- Several contracts may be signed on the same subject
- Some fixed data:
 - Need of a contract
 - Need of a contract on energy / capacity
 - Need of a contract on the use of interconnection
 - Need of coordination between stakeholders: exporter, network operators, importer.
- It is in this context that we can talk about cross-border electricity trade

CONCLUSIONS OF SECTORAL ANALYSIS



CONCLUSIONS OF SECTORAL ANALYSIS



LEGAL & INSTITUTIONAL FRAMEWORK



- The legal and institutional framework is highly varied and still unstabilized
- Regulatory bodies have highly variable jurisdiction, duties, powers and autonomy
- Very limited jurisdiction over contractual matters
- Some national authorities:
 - Obligation to inform
 - Advisory jurisdiction
 - Prerogative of control
 - Prerogative of approval

LEGAL & INSTITUTIONAL FRAMEWORK



- Legal and institutional framework is highly varied and still unstabilized
- Member States do not have similar or related laws on electricity and energy in general:
 - Opening of the electricity market to competition
 - Energy policy choices, for instance, the issue of the ATR or the Single Buyer
 - The legal and institutional framework is still unstabilized: several reforms have been carried out recently in many Member States
 - Changes are needed in the context of a progressive approach
 - Structuring principles should be stabilized

LEGAL & INSTITUTIONAL FRAMEWORK



- Regulatory bodies have highly variable competencies, duties, powers and autonomy
- The majority of countries have an entity designated as regulatory authority
- The form may vary but mostly it remains an AAI with legal personality and financial autonomy
- Competencies are highly variable
- Powers are highly variable

However, regulatory agencies are a critical link for the construction of a regional market and they are preferred ERERA partners

LEGAL & INSTITUTIONAL FRAMEWORK



- In general, very little jurisdiction in contractual matters
- For some national authorities:
 - obligation to inform: They must be informed about certain types of contracts signed internally
 - Advisory jurisdiction: The authority is consulted on import / export contracts. This remains an advisory
 - Prerogative of control: Some authorities control the content or application of certain contracts
 - Prerogative of approval: Very few authorities have this prerogative

REVIEW OF EXISTING TRADE CONTRACTS



- Concerning contracts
- Remarks on the form
 - No common form or harmonized structure
 - No clause of definitions or very few definitions
 - Quite short contracts, usually without appendices
 - Contracts signed at different times
 - Contracts belonging to different systems

Form is not a determining factor, however, it facilitates access to contracts, their understanding and therefore their negotiation

REVIEW OF EXISTING TRADE CONTRACTS



Concerning contracts

Remarks on the content

- Great disparities in the content
- Contracts dealing in general with electricity trade and access to interconnections
- Existence of "incomplete" or "provisional" clauses
- Contracts not always implemented by the parties
- Difficulties for investors
- Need for harmonization of cross-border contracts
- Impact on contracts and national aspects

REVIEW OF EXISTING TRADE CONTRACTS



Examples of clauses

- **Purpose of the contract / obligations of the parties**

Naturally, this is found in each contract

However, the scope of this provision varies considerably: from the purpose of the contract to the description of certain rights and obligations of the parties.

- **The duration**

The duration provided for in the contracts examined are extremely varied and according to the contract may last 2, 10, 15, 20 or even 25 years

REVIEW OF EXISTING TRADE CONTRACTS



Examples of clauses

- **Price**

Not always "take or pay"

Sometimes "provisional price"

Practice of review

- **Responsibility**

Clause which is not always available

Lack of procedures, methods, limitation, etc...

REVIEW OF EXISTING TRADE CONTRACTS



Conclusions

- Contracts, including the most recent, generally contain the basic terms
- These clauses are characterized by a certain disparity in their content
- It is essential to separate the import / export component from the interconnection component
- An open regional market imposes harmonized and legally robust contracts
- This is an essential element for investors and market participants



PRESENTATION OF THE ECOWAS LEGAL FRAMEWORK – SUGGESTIONS OF MODIFICATION

ECOWAS – LEGAL FRAMEWORK - MODIFICATIONS



- Founding articles of the ECOWAS Treaty
- ECOWAS objectives in the area of electricity
- Establishment of ERERA

ECOWAS – LEGAL FRAMEWORK - MODIFICATIONS



- Founding articles of the ECOWAS Treaty
- Article 3.2 (a)
- Article 26
- Article 31
- Article 55
- Primarily article 28

- Founding articles of the ECOWAS Treaty
- Article 3.2 (a) – Aims and objectives
- 2. In order to achieve the aims set out in the paragraph above, and in accordance with the relevant provisions of this Treaty, the Community shall, by stages, ensure;
 - (a) the harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism, legal matters;

ECOWAS – LEGAL FRAMEWORK - MODIFICATIONS



- Founding articles of the ECOWAS Treaty
- Article 26 – Industry
 - 1. For the purpose of promoting industrial development of Member States and integrating their economies, Member States shall, harmonise their industrialisation policies.
 - 2. In this connection, Member States shall:
 - b) promote joint industrial development projects as well as the creation of multinational enterprises in priority industrial sub-sectors likely to contribute to the development of agriculture, transmission and communications, natural resources and energy.
 - a) ensure, on the one hand, the development of industries essential for collective self-reliance and, on the other, the modernization of priority sectors of the economy especially:
 - viii) energy industries;

- Founding articles of the ECOWAS Treaty
- Article 31 – Natural Resources
 1. Member States shall harmonise and co-ordinate their policies and programmes in the field of natural resources.
 2. To this end, they shall:
 - a) seek better knowledge and undertake an assessment of their natural resources potential;
 - e) promote vertical and horizontal inter-industrial relationships which may be established among Member States in the course of developing such resources;

- Founding articles of the ECOWAS Treaty

Article 55 – Completion of economic and monetary union

Through:

- i) the adoption of a common policy in all fields of socioeconomic activity particularly agriculture, industry, transport, communications, energy and scientific research;

ECOWAS – LEGAL FRAMEWORK - MODIFICATIONS



- Founding articles of the ECOWAS Treaty
- Primarily Article 28 – Energy
 1. Member States shall co-ordinate and harmonise their policies and programmes in the area of energy.
 2. To this end, they shall:
 - a) ensure the effective development of the energy resources of the region;
 - b) establish appropriate co-operation mechanisms with a view to ensuring a regular supply of hydrocarbons;
 - c) promote the development of new and renewable energy particularly solar energy in the framework of the policy of diversification of sources of energy;

- Founding articles of the ECOWAS Treaty
 - Primarily Article 28 – Energy
- d) harmonise their national energy development plans by ensuring particularly the inter-connection of electricity distribution networks;
 - e) articulate a common energy policy, particularly, in the area of research, operation, generation and distribution;
 - f) establish an adequate mechanism for the collective solution of the energy development problems within the Community, particularly those relating to energy transmission, the shortage of skilled technicians and financial resources for the implementation of energy projects of Member States.

ECOWAS – LEGAL FRAMEWORK - MODIFICATIONS



- **ECOWAS objectives in the area of electricity**
 - To increase the energy autonomy of Member States
 - To develop energy interdependence

Step 1: Adoption of ECOWAS Energy Policy by the Conference of Heads of State and Government in May 1982

This policy calls for notably the coordination of efforts, among others

- **ECOWAS objectives in the area of electricity**
 - To increase the energy autonomy of Member States
 - To develop energy interdependence

Step 2: Establishment in 1999 of the West African Power Pool (WAPP) which is the institutional framework of the **regional electricity system**

« RECOGNIZING the vital role of the private sector in the promotion and realization of investments in energy and determination to ensure an institutional framework conducive for sustainable investments in the energy infrastructure » (Convention of 2005)

- **ECOWAS objectives in the area of electricity**
 - To increase the energy autonomy of Member States
 - To develop energy interdependence

Step 3: Adoption of the Energy Protocol in January 2003

To establish terms of reference in the economic and financial, technical and legal fields.

More specifically, the protocol aims to:

- guarantee and ensure a free flow of energy, equipment and energy products
- define non-discriminatory rules for trade and conflict settlement
- attract and protect private investments
- ensure environmental protection and development of energy efficiency

- **ECOWAS objectives in the area of electricity**
 - To increase the energy autonomy of Member States
 - To develop energy interdependence

Step 4: To put in place ERERA on 9 January 2008 (Supplementary Act A/SA.2/01/08, the creation of the ECOWAS regional electricity regulatory authority)

- Section 16.1 of the Regulation of 27 December 2007 as amended: "the overall mission of ERERA [...] to contribute to the establishment of a regulatory and economic environment conducive to the regional market development".
- Article 16.3: " ERERA shall ensure the technical regulation of regional electricity trade and monitor the regional market operation and in particular: Compliance with technical and commercial regulations on the subject and most especially conditions for access to the interconnected transmission network, entry by operators to the regional market and development of transmission infrastructure ".

- **ECOWAS objectives in the area of electricity**
 - To increase the energy autonomy of Member States
 - To develop energy interdependence

Step 4: Putting in place ERERA: Major powers

- To enact, clarify or interpret the technical and commercial rules organizing cross-border electricity trade
- To enact the implementing regulations to clarify the regulation of cross-border electricity trade
- To resolve disputes affecting the organization or operation of cross-border electricity trade
- To approve the technical rules of operation and access to the regional transmission network
- To ensure non-discriminatory access to regional transmission networks and to approve network access protocols

ERERA already has powers and duties to intervene in cross-border electricity trade contracts

ECOWAS – LEGAL FRAMEWORK - MODIFICATIONS



- Article 6.8 of the Energy Protocol
- *"The Contracting Parties agree that access to generation sources and transmission equipment of electricity encourages investment in generation and distribution and, consequently, favours competition in the electricity sub-sector; This then reduces the cost of electricity. Consequently, the Contracting Parties have agreed to ensure free and fair access to generation sources and transmission equipment of electricity, which are found in their respective zones, to other Contracting Parties and any other Investor"*.

- **ECOWAS objectives in the area of electricity**
 - To increase the energy autonomy of Member States
 - To develop energy interdependence

Step 4: Putting in place ERERA: Major powers

- Given its powers, an amendment of the regulation of 27 December 2007 may not be necessary.
- However, given:
 - the high varied level of institutional frameworks of Member States in the area of regulation of the sector
 - the sensitivity of the sector and more specifically of the issue of cross-border trade
 - the strong impact that the ERERA intervention could have on contracts, on the market, on the national operators, etc...

It shall be relevant to suggest an amendment of the regulation of 27 December 2007



- **ECOWAS objectives in the area of electricity**
 - To increase the energy autonomy of Member States
 - To develop energy interdependence

Towards step 5? ERERA's increased role in contract

- An amendment of the law is likely to provide:
 - The indisputable legal basis
 - The necessary political legitimacyTo impose its solutions on operators and national authorities including regulators
- These amendments should include:
 - An explicit jurisdiction over cross-border trade contracts
 - Disputes arising from the interpretation or execution of contracts

GUIDELINES FOR EXCHANGE CONTRACTS



GUIDELINES FOR EXCHANGE CONTRACTS



GUIDELINES FOR EXCHANGE CONTRACTS



- Within the framework of regulatory practices for contracts, many solutions could be suggested
- Two types of contracts can be identified:
 - **Importation/exportation contracts** signed between a generator in one State and a consumer in another State
 - **Access and interconnections use contracts** signed between the generator and the network operator of the first State and, between the consumer and the network operator of the second State

That definitely means an agreement between the operators of both countries

GUIDELINES FOR EXCHANGE CONTRACTS



- For exchange contracts: there are three possibilities for trade contracts:

Approved contracts

In this case, the parties are totally free and independent in negotiating and drafting the contract. However, before it is implemented, the standard contract should be presented to a public authority, who will approve it or, at least, accept it

GUIDELINES FOR EXCHANGE CONTRACTS



- For trade contracts: there are three possibilities for trade contracts:

Model contracts

In this case, the parties have to accept the contract as it has been written and can only negotiate the facts: power, prices, etc. It is obvious that the solution ensures greater security for a new entry into the market but also greatly hampers freedom of contract

- For trade contracts: there are three possibilities for trade contracts:

Mandatory model contracts

In this case, the clauses of the draft contract are the basis of negotiation between the parties and which the latter could reject. However, in case of a disagreement on any of the clauses, the contract shall maintain the clause proposed in the draft contract.

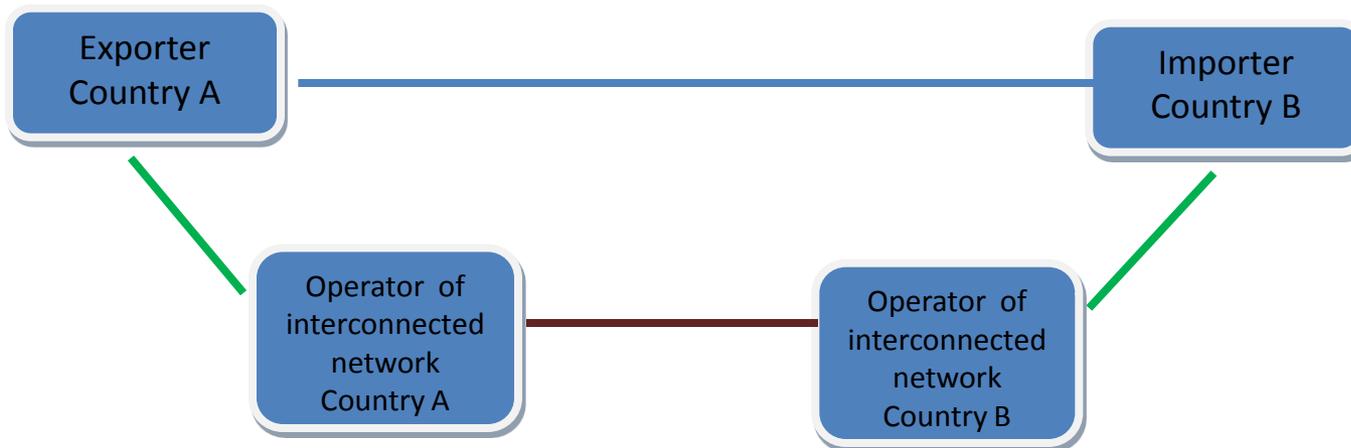
Practically, the parties involved in signing the contract would most likely opt for the draft contract

GUIDELINES FOR EXCHANGE CONTRACTS



- **Access and interconnection use contracts**
- Considering the minimal flexibility of parties in this domain, the solution of approved contracts could be suggested
- That means the existence of a legal framework that is relevant and ensures the total application of the contracts, especially:
 - the institution and respect of the principles binding the access of third parties to the network and interconnections
 - the enforcement of regulated tariff or a transparent economic set-up to access and use the interconnection

GUIDELINES FOR EXCHANGE CONTRACTS



- Electricity supply contract, whose model shall be approved by ERECA
- Exporter's access contract to the interconnected network, whose model shall be approved by ERECA
- Common management rules for the interconnected network between the two operators. These rules should be from the WAPP

GUIDELINES FOR EXCHANGE CONTRACTS



- Draft of directive
- The draft directive is based on two assumptions :
 - The harmonization action applies only to contracts which require or involve crossing borders between Member States of ECOWAS
 - The distinction between two types of contracts :
 - Importation/exportation contracts signed between a generator in one State and a consumer in another State
 - Access and interconnections use contracts

GUIDELINES FOR EXCHANGE CONTRACTS



- Draft of directive
- Article 2: Purpose of the directive

“With a view to the creation of a regional market and given the disparity of cross-border trade agreements in force or under development, **this guideline aims at harmonizing import/export contracts**”.

GUIDELINES FOR EXCHANGE CONTRACTS



- Draft of directive
- Article 3: Scope of the directive
“This directive only applies to contracts dealing with or concerned by cross-border exchange between ECOWAS member countries.

In this context, two types of contract are concerned: on one hand, access and use of interconnections contracts and, on the other hand, imports/exports of electricity contracts.

As regards trade with third party countries, the ECOWAS Member State concerned makes its best efforts to conclude a bilateral agreement which complies with the layouts of this directive”

GUIDELINES FOR EXCHANGE CONTRACTS



- Draft of directive
- Article 4: Role of ERERA (1/2)

“ERERA is responsible for developing a standard contract for import / export of electricity. Parties **freely negotiate** the terms of the import / export of electricity. If the agreement fails, the clauses of the standard contract developed by ERERA **must be included** in the contract between the two parties.

As part of the development of this standard contract, ERERA will **rely on national regulators**”

GUIDELINES FOR EXCHANGE CONTRACTS



- Draft of directive
- Article 4: Role of ERERA (2/2)

ERERA is also responsible for **approving** the standard contract developed by the managers of transmission networks in order to access and use interconnections.

To this end, the transmission system operators are **required to notify** their standard contract to ERERA before application.

ERERA has a period of two months to approve or refuse to approve the contract model. After this period, without adoption of a reasoned decision, the model contract is **presumed approved**.

In case ERERA requires by **reasoned** decision a manager to add, amend or delete certain clauses, the manager should comply with this decision.

As part of the approval of this model, ERERA shall ask for the **opinion of national regulators involved**”

GUIDELINES FOR EXCHANGE CONTRACTS



- **Draft of directive**
- Article : Obligation to communicate
- Article : Transitional period
- Article : Dispute settlements
- Article : Sanctions
- Article : Cooperation
- Article : Implementation

GUIDELINES FOR EXCHANGE CONTRACTS



- **Implementation**
- A decision laying down a **standard contract for importation/exportation of electricity** across borders
- A decision laying down the **procedure for the approval of contracts**, protocols and rules governing access, use and management of interconnections (notification of projects or existing documents, deadlines, trade, injunctions, etc.).
- A decision establishing the **procedure for dispute settlement** (referral, guidelines, respect of the adversarial principle, composition, deadlines, hearings, etc..), pursuant to Article 21 of Decision No. 001/ERERA/11 to adopt the bylaws;
- A decision fixing the **procedure for sanction** (referral, guidelines, compliance with the adversarial principle, composition, deadlines, hearings, etc...). This procedure should be applied in case of non-compliance with the rules established by ERERA (Article 30 of the Regulation dated 27 December 2012) or in case of non-compliance with a decision of ERERA, following dispute settlement.

MODEL OF HARMONISED DRAFT CONTRACTS



MODEL OF HARMONISED DRAFT CONTRACTS



MODEL OF HARMONISED DRAFT CONTRACTS



- **Draft of access contract-use of interconnections**
- Given the technical nature of the access and use of interconnection agreements, under these rules shall be developed under the WAPP
- Mission as set out in Article 3.i the decision of 19 December 1999 implementing the WAPP "*Prepare and implement the enabling environment for the development of electric West African trade.*"
- This framework should include the following rules:
 - definitions
 - programming
 - Guarantee the ability to access
 - Limitation, removing capacity
 - Obligations quality

MODEL OF HARMONISED DRAFT CONTRACTS



- **Dract of access contract-use of interconnections**
- Metering
- Tariffs and billing
- Warranty and Insurance
- Liability and Force Majeure
- confidentiality
- assignment
- cancellation
- applicable law
- Amicable settlement - Arbitration



MODEL OF HARMONISED DRAFT CONTRACTS



- Draft of exchange contracts
- **DEFINITIONS ET REFERENCES**
 - Definitions
 - References to legal provisions
 - Reading conventions
 - Interpretation
 - Appendix
- **OBJET DU CONTRAT; DURATION**
 - Purpose
 - Duration



MODEL OF HARMONISED DRAFT CONTRACTS



- Draft of exchange contracts
- **POWER COMMITMENT – ENERGY SALE AND PURCHASE**
 - Power commitment
 - Net minimum reliable power
 - Net energy
 - Programming
 - Delivery point
 - Metering

MODEL OF HARMONISED DRAFT CONTRACTS



- **Draft of exchange contracts**
- **DECLARATIONS AND WARRANTIES OF THE GENERATOR/SUPPLIER**
 - Declarations and warranties of the Generator/Supplier
 - Reactive power
 - Interruption in case of programmed/emergency operating
 - Access to information and to the Center
 - Liabilities to third parties
- **DECLARATIONS, WARRANTIES AND OBLIGATIONS OF THE BUYER**
 - Declarations and warranties
 - Emergency notifications

MODEL OF HARMONISED DRAFT CONTRACTS



- **Draft of exchange contracts**
- **TARIFF**
 - General provisions
 - Power-related charges
 - Energy-related charges
 - Warranties
 - Legal amendment
- **BILLING AND PAYMENT**
 - Billing
 - Payment date and currency
 - Delays
 - Disputes related to billing
 - Payment of penalties or reimbursements
 - Compensation
 - Taxes

MODEL OF HARMONISED DRAFT CONTRACTS



- Draft of exchange contracts
- **LIABILITY AND COMPENSATION**
 - Liability
 - Compensation
 - Procedure
 - Exclusion

MODEL OF HARMONISED DRAFT CONTRACTS



- Draft of exchange contracts
- **APPLICABLE LAW - SETTLEMENT OF DISPUTES**
 - Applicable law
 - Independent expert
 - Arbitration / jurisdiction
 - Immunity
 - Severability

IMPLEMENTATION OF LEGAL FRAMEWORK - RECOMMANDATIONS



IMPLEMENTATION OF LEGAL FRAMEWORK - RECOMMANDATIONS



GUIDELINES FOR TRADE CONTRACTS



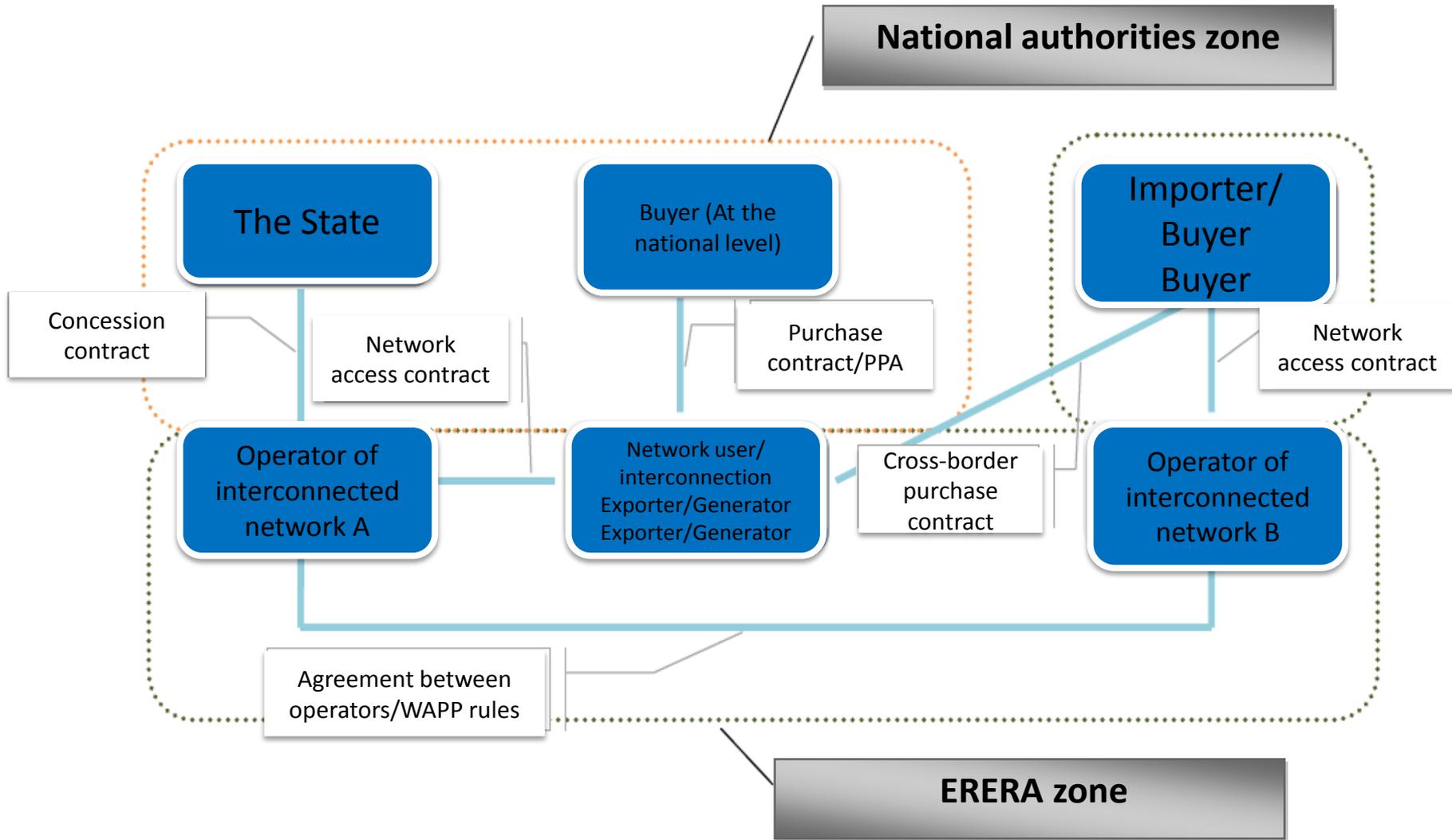
- **Some principles**
- A legal framework based on regional texts, on the one hand, and national texts on the other
- The legal framework that enables the implementation of energy contracts to set up a regional market should be based on ECOWAS texts, in general, and especially ERERA texts
- It is important for the national legal framework to match that at the regional level
- Priority should be given to the energy sector
- Example of the sole buyer status

GUIDELINES FOR TRADE CONTRACTS



- Clear sharing of responsibilities at the regional and national levels
- ERERA's area of influence should be limited to cross-border issues
- In order to avoid faults, some aspects of national legal frameworks should be harmonised
- The need for close collaboration between national authorities and ERERA

GUIDELINES FOR TRADE CONTRACTS



GUIDELINES FOR TRADE CONTRACTS



- **Institution of regulatory authorities**
- A coherent and effected legal framework at the regional level requires independent regulatory authorities vis-à-vis actors in the market and the States.
- Given that the State has priority or controls the elements of generation, supply and importation/exportation of electricity, regulating the market should be the duty of an independent body
- The attributions of the State cannot be determined in fixing the energy policy or ensuring continuous supply
- Missions relating to the market, conditions for competition, trade including cross-border trade, should be the duty of an independent regulatory authority

GUIDELINES FOR TRADE CONTRACTS



- **Preservation of the principle of freedom of contract**
- It is important for regulatory bodies, with ERERA at the top, to intervene and they should have extensive powers to do so
- As the market opens up to competition and freer trade, their intervention should not challenge the freedom of contract as well as negotiation and trade freedoms
- That is why it would be wise to use the solutions found in the draft contracts
- The parties shall conform to the draft contract insofar as it is generally accepted and balanced. However, they will be free to negotiate and sign the contract

GUIDELINES FOR TRADE CONTRACTS



- **The need for transparent management of interconnections**
- Interconnections, which are an integral component of the transmission network shall always be managed as a monopoly granted to the operator of these networks
- It is important for the interconnections to be managed with transparency and fairness (attribution of power, programming, prices, reductions, etc.).
- ERERA should approve the rules before implementation

GUIDELINES FOR TRADE CONTRACTS



- Principle of progressiveness
- Considering the disparities, setting up a regional wholesale electricity market should be done progressively:
 - Countries concerned
 - Different stages to create an effective regional wholesale market
- It would therefore not be necessary to impose the same level of harmonisation and the same requirements in implementing contracts
- Interconnections impose the graduation
- The long-term objective could lead to a regional stock exchange

THANK YOU



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